PAPERWORK CONSIDERATIONS

This bill would result in a massive reduction of paperwork, which would be felt both on the taxpayer and government levels.

CHRONOLOGY OF SMALL BUSINESS DEPRECIATION REFORM LEGISLATION

1. Summer 1975. Senate Small Business Committee opens hearings on "Tax Reform for Small Business," June 17–18–19, 1975, and begins work with business groups to explore improvements to depreciation/capital formation.

2. July 31, 1975. Senator Nelson summarizes first round of hearings in testimony to House Ways and Means Committee, as follows:

"Capital Recovery.—These provisions of the Code should be greatly simplified so they will be more equally useable by businesses of smaller sizes and resources. Complexity is as much a problem as inflation for new and smaller firms seeking to recover their capital for renewal of existing plant and equipment. The Committee for renewal of existing plant and equipment. The Committee hopes to delve more deeply into comparisons between the Canadian and American capital recovery systems, and the proposals for accelerated capital recovery costs versus inflation-indexed accounting."

3. Sept. 23, 1975. Second series of hearings on Small Business Tax Reform beginning September 23, 1975, featured the following: panel of witnesses on capital formation and capital recovery: Panel Members: Norman B. Ture, Economic Consultant, Washington, D.C.; Michael Sumichrast, Chief Economist, National Association of Home Builders; Roland M. Bixler, President, J. B. T. Instruments, Inc., and Chairman, Small Business Tax Policy Task Force, National Association of Manufacturers; David Barnes, CPA, Coopers and Lybrand, Chairman, Tax and Government Regulation Committee, Council of Smaller Enterprises, Cleveland, Ohio; Jerry T. Jones, President, Sonicraft Corp., Chairman, Board of Directors, National Association of Black Manufacturer; and Charles W. Rau, Director of Taxation, Allis Chalmers Corp., Chairman, Taxation Committee, Wisconsin State Chamber of Commerce, and also representing the Wisconsin Manufacturers Association and Metropolitan Milwaukee Association of Commerce.

The representatives of the Council of Smaller Enterprises presented a paper entitled "Present Tax Depreciation Rules are Yesterday's Answer to Today's Problem" which concluded: "Present tax depreciation rules and regulations need to be overhauled and replaced with progressive programs that provide small business concerns the flexibility to internally generate capital by employing a liberal, noncumbersome, rapid depreciation write-off method which will maximize depreciation charges in times when funds are needed for expansion."

Mr. Rau, representing several Wisconsin business groups, furnished detailed tables showing how much capital would be "lost to inflation" on purchases of equipment assuming either 5 percent or 10 percent inflation rates under the most favorable existing depreciation structures. On this basis, Mr. Rau advocated 5-year depreciation for industrial machinery and a 10-year period for plant and other real estate facilities.

4. 1975. H.R. 7543 introduced in the House of Representatives by Rep. Waggonner proposing 5-year depreciation for equipment and 10-year depreciation for real estate without limitation as to amount.

5. 1976. Preliminary revenue estimates on 2- 3- and 4-year depreciation obtained from Joint Tax Committee. Contract let by Senate Small Business Committee to Wharton Econometric Forecasting Associates to do econometric study of accelerated depreciation. Preliminary discussion of alternatives by Senator Nelson.

6. October 17, 1977. Senator Nelson presents memorandum to President Carter and Vice President Mondale on this date recommending three-year accelerated depreciation at $100,000 to $200,000 level with one-third of investment credit retained; in the following terms:

CAPITAL COST RECOVERY

Because most small businesses use straight-line depreciation, the Committee proposes an optional simple straight-line depreciation system, with a shorter useful life—perhaps three years—for investments in new or used equipment up to an appropriate level (perhaps $100,000 to $200,000). Where this system is elected, it would eliminate the complicated combination of bonus depreciation, ADR, and rapid depreciation and amortization methods, investment credit, salvage value, disputes about useful life, and recapture provisions for smaller businesses. It would relieve much of the pressure for "indexing" depreciation or substituting replacement cost accounting in the future. It is contemplated that this benefit would be available to businesses of all sizes, but that it would be simple and understandable and therefore attractive to, and most used by the great majority of small enterprises, for whom it would constitute a true reform in this important area.

7. December 1977. Informal memos with preliminary computer estimates of revenues and tax savings for 3-year accelerated depreciation at $50,000 and $100,000 levels sent to high Administration staff officials for consideration.

8. January 1978. Suggestion for 3-year accelerated depreciation at $100,000 to $200,000 levels placed before the Senate, "Shortage of Capital Causing Flight of U.S. Technology to Foreign Countries—Overhaul of Tax and Capital Formation Policies Urgently Needed for Small Business", Senate remarks by Senator Gaylord Nelson, *Congressional Record*, Jan. 4, 1978. ps. 19968.

9. March 1978: Introduction by Senator Nelson of $100,000 three-year accelerated depreciation bill at $100,000 of purchases with one-third of investment credit retained (S. 2742) "Small Business Depreciation Simplification and Reform Act", *Congressional Record*, March 14, 1978, page S3672–73.

10. September 1978. On basis of computer revenue estimates, the decision was made to increase to full investment credit and lower purchase limit to $25,000. This leads to introduction of S. 3493 on September 12, 1978.

10. October 1978. S. 3493 cast in Amendment form: No. 3690, No. 4483 and others for procedural reasons, "Accelerated and Simplified Depreciation for Small Business", *Congressional Record*, October 3, 1978,

11. Oct. 10, 1978. Amendment No. 4483—3-year $25,000 accelerated depreciation passes Senate on 62–25 rollcall vote, *Congressional Record*, October 10, 1978, page 17941.

12. Oct. 15, 1978. Senate accelerated depreciation provision eliminated in House-Senate conference because of out-year revenue costs.

13. January 1979. Reintroduction of 3-year accelerated depreciation bill at $25,000 with full investment credit, substantially identical to Amendment No. 4483 except for technical changes.

By Mr. BUMPERS:

S. 111. A bill to improve the administrative process by making Federal agencies more responsive to the will of the people as expressed by their elected representatives in Congress; to the Committee on the Judiciary.

TO MAKE FEDERAL AGENCIES MORE RESPONSIVE

● Mr. BUMPERS. Mr. President, in the past two sessions of Congress I introduced a bill to amend the Administrative Procedure Act to make Federal agencies more responsive to the will of the people as expressed by their elected representatives in Congress. I first introduced the bill (S. 2408) in the 94th Congress and the bill was referred to the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary. The chairman of the subcommittee, the distinguished Senator from Massachusetts (Mr. KENNEDY), held hearings on S. 2408 on May 3, 1976, at which I testified.

Later, when S. 800, another administrative-law bill, passed the Senate, the Senator from Massachusetts and I discussed S. 2408 on the floor of the Senate. At that time Mr. KENNEDY agreed to solicit the views of the bench and bar on this proposal, and I announced my intention to reintroduce the bill promptly on the convening of the 95th Congress.

I introduced S. 86 on January 10, 1977. The bill was identical to S. 2408 of the 94th Congress. The Senate Judiciary Committee did not hold hearings on S. 86 during the 95th Congress.

I remain firmly convinced that legislation of this nature is sorely needed. Therefore, Mr. President, I introduce for appropriate reference S. 111, a bill identical to S. 2408 of the 94th Congress, and S. 86 of the 95th Congress.

The bill would accomplish two ends. It would direct the courts to decide for themselves, without deference to so-called administrative "expertise," all issues of law, and it would reverse the traditional presumption that agency regulations are valid. For convenient reference, I ask unanimous consent that the text of the bill be printed in full at this point in my remarks.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 111

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the portion of Public Law 89–554, (80 Stat. 393); now codified as Section 706 of Title 5, United States Code, is amended by striking out the first sentence thereof and substituting therefor the following:

"To the extent necessary to decision and when presented, the reviewing court shall decide de novo all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the agency action. There shall be no presumption that any rule or regulation of any agency is valid, and whenever the validity of any such rule or regulation is drawn in question in any court of the United States or of any State, the court shall not uphold the validity of such challenged rule or regulation unless such validity is clearly and convincingly shown: *Provided, however,* That if any rule or regulation is set up as a defense to any criminal prosecution or action for civil penalty, such rule or regulation shall be presumed valid until the party initiating the criminal prosecution or action for civil penalty shall have sustained the

burden of proof normally applicable in such actions."

Mr. BUMPERS. Mr. President, present doctrines of administrative law insure that almost every rule or regulation adopted by a Federal agency is upheld in the courts. There is a presumption, it is said, that such rules or regulations are within the authority granted by Congress, or by Executive order, to the particular agency involved. It is my view that there should be no such presumption, and that administrative law has come to the point where the traditional doctrine should be reversed. The burden should be upon the Federal agency, which has at its command the resources of the sovereign, to establish the validity of its own action, instead of being placed upon the citizen to prove the reverse.

The bill I introduce today would do just that. First of all, it would restore the courts to their normal law-interpreting and law-applying role in our system of Government. It would insert the words "de novo" in the first sentence of 5 U.S.C. 706, the sentence that concerns decision by the courts of questions of law in actions to review Federal agencies. Courts could still defer to administrative "expertise," if there is in fact such a thing, when deciding issues of fact, and the traditional "substantial evidence" rule applied to such issues would be undisturbed.

In the realm of law, however, the supremacy of the courts, who are sworn to apply and enforce the statutes of Congress, would be restored. A decision by an agency on an issue of law would no longer be upheld simply upon a finding that there is "warrant in the record" for it. The court would actually use its own judgment on such issues. Furthermore, the presumption in favor of the validity of agency rules and regulations would be eliminated, and the burden of establishing this validity would be shifted to the agency, a party better able to bear it. Only if a court were clearly and convincingly persuaded, for example, that a given rule or regulation was within the power delegated by Congress, would the rule or regulation be upheld.

In this way, Congress would be confirmed as the true and only source of legislative power in our society. Only those agency rules and regulations clearly within the congressional mandate would remain intact. Finally, a proviso in the bill would make clear that the traditional heavy burden of proof borne by the prosecution in criminal cases and, to a lesser extent, by the United States when seeking to enforce a civil penalty, would not be altered. In these instances, if a defendant asserted an agency rule or regulation in bar of a criminal prosecution or action for civil penalties, the opposing party, usually the United States, would still have to sustain the burden of proof usually associated with these kinds of enforcement proceedings.

A number of persons and groups have been kind enough to review this proposal and offer their views. I am disappointed that some of these comments are unfavorable, but I nonetheless appreciate the time and effort they represent, because they do give me a chance to examine anew the justification for the bill, and to consider with care the objections that have been raised.

Two law professors are among those who have commented—Nathaniel L. Nathanson of Northwestern and Clark Byse of Harvard—in their capacity as members of the Committee on Judicial Review of the Section of Administrative Law of the American Bar Association. In general, their objections to the bill are twofold: First, that courts are not in fact so deferential to the agencies as I have claimed, and second, that in any event they are no more deferential than they should be. In order that the full record may be laid before the Congress and the public, I ask unanimous consent that Profesor Byse's letter of September 16, 1976, and Professor Nathanson's letter of September 8, 1976, be printed in full in the RECORD at this point in my remarks.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

HARVARD LAW SCHOOL,
Cambridge, Mass., September 16, 1976.

FRANCIS M. GREGORY, Jr., Esq.,
Washington, D.C.

DEAR MR. GREGORY: The receipt of a copy of Nat Nathanson's September 8 letter to you emphasizes my failure to reply to your inquiry re S. 2408, and so, amends, herewith.

In general, I agree with Nat's observations. More specifically, there is reason to believe that the proponents of the measure are proceeding on the basis of mistaken perceptions.

1. See 121 Cong. Rec. S. 16573, 1st col. (Sept. 24, 1975), where the holding of NLRB v. Hearst is discussed. For the correct analysis of Hearst, see Nat's article in * * * and L. Rev. 470–473 (1950), reprinted in Gellhorn and Byse, Administrative Law Cases and Comments 450–451 (6th ed. 1974). See also enclosed reprint, pp. 564–567. It is conceivable that the proponents of S. 2408 want courts to exercise a de novo review concerning administrative decisions on matters which Congress has rather clearly delegated to the agencies for decision by them. If that is their objective, I must, with all deference, say I think that would be most unwise. As the Court said in United States v. Louisville and Nashville, R.R., 235 U.S. 314, 321 (1914), under such a view "the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their alternate action." The Court rejected that view in 1914. I do not believe that it should be resurrected in 1976.

2. I think that the government lawyers, who appear before the District of Columbia Circuit—would hardly agree that that court fails to discharge its judicial responsibility to determine the scope of discretion delegated to the agency by Congress. Judge Leventhal insists upon a "hard look" and a "reasoned decision"; Chief Judge Bazelon embraces the "new era." Although undoubtedly there are judges or panels of judges or courts which at times fail to discharge their reviewing responsibilities, I do not think this is a general weakness which needs the corrective action proposed by S. 2408. It seems to me that it is not accurate to state that courts are guily of "virtually rubber-stamping every agency action that comes before them for review"—see Congressional Record S. 11350, col. 3, 1st 2 lines (July 1, 1976). My judgment on the matter is stated in the last sentence of the enclosed reprint.

3. I am not as confident of the point I now address as perhaps I should be. However, my impression is that the courts have shifted, or are in the process of shifting, from the view that regulations are presumptively valid. See, e.g., *Chicago* v. *FPC*, 458 F. 2d 731 (D.C. Cir. 1971), cert. denied 405 U.S. 1074 (1972), discussed in Gellhorn and Byse, supra, pp. 736–737.

I conclude that although there may be a problem concerning presumptive validity of rules, as presently advised I rather doubt it. If there is such a problem, it should be demonstrated. The proponents have not made such a demonstration. Until there is such a demonstration, there is no need to consider a remedy. When and if such a problem is demonstrated, the remedy should be tailored to fit the problem. The present proposal is thus premature.

I conclude further that there is no need for a statutory change in the APA provisions governing review of so-called questions of law.

Sincerely,

CLARK BYSE.

NORTHWESTERN UNIVERSITY
SCHOOL OF LAW,
Chicago, Ill., September 8, 1976.

FRANCIS M. GREGORY, Jr., Esq.
Suite 800, 1666 K Street, N.W.
Washington, D.C.

DEAR FRANK: In further reference to your letter of July 21, 1976, and the enclosures, particularly S. 2408, I just want to say that I am not at all impressed with the desirability of such an amendment to the APA. I say this with some regret since Senator Bumpers is an alumnus of ours for whom I have considerable affection and regard.

In substance the bill seems to reopen an ancient controversy which, I believe, has been satisfactorily resolved in actual practice; namely, how much deference a reviewing court should pay to an administrative agency's determination of a question of law, particularly one involving an interpretation of the agency's authorizing statute or one of its own regulations. I doubt that any statutory formulation can improve upon the guidelines laid down in leading Supreme Court opinions, such as Cardozo's opinion in Norwegian Nitrogen Products v. United States, 288 U.S. 294 (1933), Jackson's opinion in Skidmore v. Swift Co., 323 U.S. 134 (1944), the Frankfurter opinion in Addison v. Holly Hill Fruit Products Co., 322 U.S. 607 (1944) and more recently the opinions in Mourning v. Family Public Service, Inc., 411 U.S. 356 (1973) and Morton v. Ruiz, 415 U.S. 199 (1974). I am particularly suspicious of a statutory provision that makes use of the cryptic phrase "de novo" with all its uncertain connotations.

So far as I am aware the federal courts have not been giving blind obeisance to administrative determinations of law in recent years. Consequently I am curous about the stimulus for this particular proposal. The Congressional Record excerpt, attached to your communication, suggests that there is concern over the rulmeaking power of the F.T.C., and certain new enforcement powers of the F.T.C. regarding their own orders. With respect to the rulemaking power, the statute provides considerable procedural protection, and desreves at least a trial period; judicial review of the validity of the rules is assured and there is no reason to believe it will be only a formality. With respect to enforcement of orders against respondents who were not parties to the original proceeding, that particular provision should be debated on its own merits and not made the occasion for a sweeping change in fundamental principles of judicial review.

I trust that this is sufficient to start a meaningful committee dialogue on the subject.

Sincerely,

NATHANIEL L. NATHANSON.

Mr. BUMPERS. Mr. President, I am especially struck by Professor Nathan- federal courts have

not been giving blind obeisance to administrative determinations of law in recent years," and by Professor Byse's "impression * * * that the courts have shifted, or are in the process of shifting, from the view that regulations are presumptively valid." These opinions call in question the very predicate for my bill—that courts in most cases are deferring to agencies, even on questions of law—so it seems appropriate to begin the debate by examining the present state of the law at some length. The questions to be answered are, "Do courts defer to agencies on questions of law," and "Is an agency regulation presumed valid?"

A number of opinions of the Supreme Court are in accord with the rule of *NLRB* v. *Hearst Pubs., Inc.*, 322 U.S. (1944), that an agency's interpretation of its own governing statute is to be upheld if it is reasonable and has warrant in the record, regardless of whether the court would itself have reached the same conclusion as an original matter. In Hearst, the question was whether newsboys are "employees" within the meaning of section 2(3) of the National Labor Relations Act, 29 U.S.C. section 152(3); as opposed to independent contractors. In upholding the Board, the Supreme Court said:

Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute . . . but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited . . . the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law. (322 U.S. at 130–31.)

The key phrase "warrant in the record" appears to come from *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939), in which the question was whether one company had "control" of another within the meaning of section 2(b) of the Communications Act of 1934, 47 U.S.C. 152(b). The Court held that the agency's decision on this issue must be upheld:

So long as there is warrant in the record for the judgment of the expert body it must stand. (307 U.S. at 145–46.)

It should be observed, however, that the Court characterized the question of "control" as an issue of fact, so the Hearst court's use of this citation can be questioned.

The wide latitude given to the NLRB by Hearst is further illuminated by the dissenting opinion of Mr. Justice Roberts. Taking what might have been thought, at least at one time, the more orthodox view, he argued:

Congress did not delegate to the NLRB the function of defining the relationship [of employment] so as to promote what the Board understood to be the underlying purpose of the statute. The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question. (322 U.S. stat 125–26.)

To the same effect is *Gray* v. *Powell*, 314 U.S. 402 (1941), involving the meaning of the term "producer" under the Bituminous Coal Act of 1937, 50 Stat. 72. The statute did not expressly define this term. On undisputed facts, the agency's interpretation and application of the statutory term were upheld. The Court spoke rather broadly of the range of power committed to the agency:

In a matter left specifically by Congress to the determination of an administrative body, . . . the function of review placed upon the courts . . . is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. (314 U.S. at 411.)

Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly, a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director . . . It is not the province of a court to absorb the administrative function to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action. (Id. at 412.)

In short, the agency will be upheld unless its conclusion "is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment. . . ." (Id. at 413.)

Another famous opinion often cited for a similar proposition is *Norweigan Nitrogen Prods. Co.* v. *United States*, 288 U.S. 294 (1933). The question there was whether the notice and hearings afforded by the U.S. Tariff Commission were "reasonable" within the meaning of section 315 of the Tariff Act of 1922, 42 Stat. 858, 941. In upholding the Commission, the Court, speaking through Mr. Justice Cardozo, said:

True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of a command is indefinite and doubtful. The practice has peculiar weight when it involves a contemporary construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. (288 U.S. at 315.)

The Supreme Court has continued to elaborate the doctrine in more recent cases. A good example is *Mourning* v. *Family Pubs., Inc.*, 411 U.S. 356 (1973). Section 121 of the Truth in Lending Act, 15 U.S.C. 1631, requires creditors to disclose certain information "to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed * * *" In addition, under section 105 of the act, 15 U.S.C. 1611, the Federal Reserve Board "shall prescribe regulations to carry out the purposes of (the Act). These regulations may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions as in the judgment of the Board are necessary or proper to effecutuate the purposes of (the Act), to prevent circumvention or evasion thereof, or to facilitate compliance therewith." The Board thereupon issued regulation Z, requiring disclosure of the specified information whenever credit is offered to a consumer "for which a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments." (12 C.F.R. 226.2(k) (1972)).

A rather clear issue was thus drawn as to the power of the Board to issue regulations going beyond the terms of the statute as strictly parsed. Under the statute, a person is entitled to certain information, including the annual rate of simple interest, if two requirements are met. First, consumer credit is extended to him; and second, a finance charge is or may be imposed on this credit. Regulation Z, by contrast, specifically requires disclosure even if a finance charge is not imposed, if the obligation is payable in more than four installments pursuant to an agreement. The Court upheld the rule, relying particularly on the broad command to the Board to prescribe regulations not only to effectuate the purposes of the act, but also to prevent circumvention or evasion thereof.

We have consistently held that where reasonable minds may differ as to which of several remedial measures should be chosen courts should defer to the informed experience and judgment of the agency to whom Congress delegated appropriate authority. (411 U.S. at 372.)

It may be conceded that the force of the general rules here quoted varies with the individual circumstances and situations to which they are applied. How broadly the statute is worded, whether it is newly enacted, the specific terms of the statute's command to issue regulations, the technical complexity of the subject matter, whether a regulation is "interpretative" or "legislative," all these factors are relevant to the latitude that the courts are willing to concede. On the whole, however, the law may be accurately summarized by the following quotation from *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965):

When faced with a problem of statutory construction, this court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is a result we would have reached had the question arisen in the first instance in judicial proceedings."

A multitude of cases in the lower courts can be cited to sustain the same general proposition. For present purposes, it suffices to mention a few examples. *Gulf Oil Corp.* v. *Hickel*, 435 F. 2d 440, 444–45 (DC Cir. 1970) ("Deference is properly accorded by a court to administrative interpretations of statutes and regulations, unless plainly erroneous or inconsistent with the law or regulation."); *Housing Auth. of the*

City of St. Paul v. *United States*, 432 F. 2d 455, 458–59 (Ct. Cl. 1970) ("In a number of cases this court has also held that it can invalidate such a regulation only if it clearly contradicts the terms or purposes of the new statute."); *E. W. Coslett & Sons, Inc.* v. *Bauman*, 354 F. Supp. 330, 332–33 (E.D. Pa. 1973) (deferring to a Federal agency on an issue of State law!); *City of Burlington* v. *Turner*, 336 F. Supp. 594, 602 (S.D. Iowa 1972) (deferring to the agency even where there is a dearth of expertise and the statute in question has neither been continuously interpreted nor examined contemporaneously with its enactment).

In practice, this doctrine can cede to administrative agencies, a branch of Government hardly contemplated by the Constitution, a share of the judicial power. It is hornbook law that Congress may not actually delegate legislative power to any other person or agency. What the agencies are doing, therefore, must be the interpretation and executive of law made by Congress. In deciding whether their actions accord with the will of Congress, assuming that a factual finding on which a certain proposal may be predicated has been made, the agencies must, as a matter of logical necessity, be construing and interpreting law. This is a traditional and proper function of the judiciary, and, to the extent that the courts affirm construction of statutes that they would not themselves have adopted as an original matter, they are abdicating one of their most important duties.

On the second question, whether rules and regulations issued by Federal agencies are entitled to a presumption of validity, my differences with Professors Byse and Nathanson are, if anything, sharper. In particular, Professor Byse has the "impression * * * that the courts have shifted, or are in the process of shifting from the view that regulations are presumptively valid." In support of this opinion he cites *City of Chicago* v. *FPC*, 458 F. 2d 731 (D.C. Cir. 1971), cert. denied, 405 U.S. 1074 (1972). The Federal Power Commission had decided to set gas rates on an area-wide basis, using composite cost data from all of the producers in a given area, instead of setting rates for an individual producer, based upon that producer's own costs. The question arose whether the area-rate system should be applied to pipeline companies as well as to so-called independent producers of gas. The Commission decided to apply the area system to the pipeline companies, and the Court of Appeals affirmed this decision. Although Professor Byse's letter and casebook, Gellhorn & Byse, Administrative Law: Cases and Comments 736–37 (6th ed. 1974), both assert that the case is contrary to the traditional doctrine of presumptive validity, I must say that a thorough reading of the opinion fails to disclose any such tendency to me.

The casebook goes so far as to claim that city of Chicago repudiates the Supreme Court's opinion in *Pacific Box & Basket Co. v. White*, 296 U.S. 176 (1935). That was a unanimous opinion delivered by Mr. Justice Brandeis, in the course of which the Court said that there is a rebuttable presumption of the existence of a state of facts to justify the exertion of the police power," 296 U.S. at 185. Referring to a regulation of a State administrative agency, the Court added:

> But where the regulation is within the scope of authority legally delegated, the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies. (*Id.* at 186.)

As I have already noted, nothing in city of Chicago appears contrary to this rule. It would not make any difference in any event, because an opinion of a court of appeals, even a recent one, surely cannot have enough force to overrule one of the Supreme Court. In any case, recent opinions of the Supreme Court, as well as lower Federal courts, prove that the presumption of validity is still a vital doctrine of law. A few examples will suffice.

Probably the leading recent case on judicial review of agency action is *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). In the course of a wide-ranging opinion strictly limiting the area in which agency action is not reviewable at all, the court reaffirmed traditional dogma:

> Certainly, the Secretary's decision is entitled to a presumption of regularity. See, *e.g., Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185 (1935); *United States* v. *Chemical Foundation*, 272 U.S. 1, 14–15 (1926).

The origin of the rule may be in a generalized presumption, long dear to courts, that any official act is regular and lawful. Chemical Foundation, cited by the Court in Overton Park, states:

> The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties. (272 U.S. at 14–15.)

This presumption operates not only on the overall question of validity of agency action, but also with respect to certain subsidiary issues that may be raised in a suit to overturn an agency's determination. A common issue in such cases, for example, is whether an agency's ruling in a particular case is a departure from its own precedents. There is a presumption, the Court has said, that the policies of Congress will be carried out best if these administrative precedents are adhered to:

> There is, then, a presumption that . . . [the] policies [committed to an agency by Congress] will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.

Atchison, T. & S. F. Ry. v. *Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (opinion of Marshall J, joined by four Justices and announcing the judgment of the Court).

Cases in lower courts announcing the same rule are legion. Many such cases are in the District of Columbia, perhaps the most frequent forum for suits against Federal administrative agencies. A typical statement is contained in *Maryland-National Capital Park & Planning Comm'n* v. *U.S. Postal Service*, 487 F. 2d 1029, 1034 (D.C. Cir. 1975) (per curiam): "* * * there is a judicial presumption of the validity of administrative action and the burden was upon the [plaintiff] * * * to overcome that presumption." *Accord, e.g. Air Transport Ass'n of America* v. *Federal Energy Office*, 382 F. Supp. 437, 453 (D.D.C. 1974) ("Moreover, the party attacking the regulatory scheme carries the burden of persuasion."); *United Black Fund, Inc.* v. *Hampton*, 352 F. Supp. 898, 903, (D.D.C. 1972) ("It should be noted * * * that there is judicial presumption of the validity of administrative action, that the burden is on a plaintiff to overcome that presumption, and that the Court will uphold such action if it has a rational basis.")

Mr. President, it would unnecessarily lengthen this statement to add the citations of all the other cases that are to the same effect, but I have collected them in an appendix, including representative quotations, and I commend the appended list to the attention of my colleagues. All of the cases in the list are recent. As a matter of fact, I made an effort to single out all of the cases decided by the Federal courts in the last 5 years on this point, and they are remarkably uniform in their teaching. I feel sure that anyone reading these opinions with an open mind cannot fail to reach the conclusion that the presumption of administrative correctness is an untrenched doctrine of judge-made law, not likely to be changed or even substantially modified in the absence of an act of Congress.

One other specific objection to the bill should be addressed. Professor Nathanson dislikes "the cryptic phrase 'de novo' with all its uncertain connotations." I find this attitude surprising, in view of the fact that the Administrative Procedure Act itself, 5 U.S.C. section 706(2)(F), already requires reviewing courts to set aside agency action that is "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." The Freedom of Information Act, 5 U.S.C. section 552(a)(3), also uses the phrase. As a matter, this act provides, in language that is a strong legislative precedent for the proposal I am making today: "In such a case (where an agency has withheld documents) the court shall determine the matter de novo and the burden is on the agency to sustain its action." The committee reports on the FOIA contain strong supportive language that is also applicable to the present bill:

> That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and to prevent it from becoming meaningless judicial sanctioning of agency discretion (S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965)). See also H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966).

In any case, the meaning of the phrase "de novo" is plain and obvious. It means that the courts will decide issues of law anew, without deference to previous agency determinations. Some such phrase must be added to the statute if present judicial practice is to be changed. The Administrative Procedure Act, 5 U.S.C. 706, already provides that "the reviewing court shall decide all relevant

questions of law * * * (and) interpret constitutional and statutory provisions. * * *". That language, though plain enough, has not sufficed to require courts actually to decide issues of law for themselves.

A word should also be said about the objection of the Judicial Conference of the United States. Its position is simple enough: it opposes the bill because it does not want any more work to do. Mr. President, I am a little taken aback by this attitude, which hardly becomes a public servant. The judges, like the rest of us, should accept the tasks they are assigned and do their duty. At any rate, the answer to this objection, if it is a fact that the courts' workload will increase, is not to junk a needed reform, but to give the courts the manpower they need to do the job.

The question remains, after all the legal argumentation over precedents and other technical points is done with, "Is there a need for a change in the law?" Put another way, have agencies become so powerful today that they should be checked? This is not a question of law, strictly speaking, at all, but a question of Government, or politics. If there is an issue of public policy on which there is a broader consensus in this country, I am unaware of it. A glance at only a small portion of the mail that comes into congressional offices each day will suffice. The theme of over-regulation recurs with at least as much frequency as any other. Nor does the voice of complaint come only from businessmen who, it might be thought, have an economic motive for their desire to shake the restraints of Government.

Citizens' groups of all kind, environmentalists, consumers, unions, and others, are unanimous in complaining that Government, most often manifested in regulations issued by executive or administrative agencies, has become too intrusive. For agencies to concern themselves with how close toilets should be to farmworkers, or with whether a school's "dress code" can allow girls to have longer hair than boys, is nothing but ridiculous.

What is to be done about it? Most opponents of my proposal suggest that Congress created the problem and should therefore be responsible for solving it. In pointing the finger of blame at the legislative branch, they are correct, and I would be the last to dispute it. Beginning at least as early as the creation of the Interstate Commerce Commission in 1887, and continuing with ever greater intensity since the coming of the New Deal, Congress has avoided many hard choices simply by delegating much of its work to independent or executive agencies. Most of this delegation has escaped constitutional censure because it was accompanied by some standards of action, however vague; but the fact remains that Congress, by giving the agencies such latitude, is responsible, at least vicariously, for much of the agencies' abuse of office.

Why then should Congress not correct its own errors? The answer is that it should, at least by the extent of being stingy about creating new agencies or delegating new powers to existing ones. Congress ought to rest from creation for a while, and I suspect such a respite would meet with universal public approval. As to those laws and agencies that already exist, the matter is not so simple. Congress could, in theory, review all the existing statutes and repass them, this time making more particular and specific the mandate of each agency.

The difficulty is that each of the broad legislative grants of power to agencies have already been particularized by the agencies themselves. These surrogates for Congress have spun out whole codes of regulations and interpretations, most of which have the force of law. Each of these specifications has acquired its own constituency of support, and it is not realistic to expect an elected Congress to tackle the massive task of reviewing the whole complex of administrative edicts now on the books.

One other possibility of congressional action for the future should be addressed. A number of bills were introduced in the last Congress to allow either House, by resolution, to prevent any rule or regulation of a Federal agency from going into effect. No doubt similar proposals will be before us this year. The idea has some appeal. It would interpose the Congress between the agencies and the people. The history of the device of one-House disapproval as a check on Executive action, however, is discouraging. There is reason to fear that in practice most regulations would go routinely into effect.

The sheer volume of material that would have to be reviewed each day would almost compel this result. In the end, agencies would be even more strongly insulated from judicial review than they are now. Suppose, for example, that you are a judge before whom a regulation's validity is being challenged. The regulation was transmitted to the appropriate committees of Congress and was not, within the time allotted by law, disapproved by either House. There is a strong inference, unlikely to escape even the most theoretical judge, that Congress has tacitly affirmed that the regulation is not contrary to its intent in enacting the agency's governing statute. The citizens contesting the regulation are probably worse off than they would have been had it never been submitted to Congress in the first place.

Some have suggested that the executive branch should put its own house in order, and that one way to help is to destroy the independence of the quasi-judicial agencies like the Securities and Exchange Commission and make them responsible to the President. The idea will appeal greatly to those who believe in symmetry as an end in itself, and certainly it would inescapably fix responsibility for all agency action in an elected officer answerable to the people. On the other hand, I can see no particular reason to believe that such a change would result in regulations more narrowly drafted, or more clearly within the intent of Congress. Agencies directly and immediately responsible to the President—HEW, FEA—have offended just as markedly as those that are in some sense independent.

The cure for the disease of administrative overreaching, Mr. President, is not exotic. It is not novel. It is simply a reliance on one of the three traditional branches of our Government—the courts. I can understand why those who initiated the great regulatory reforms of the New Deal in later years were fearful of broad judicial review. The judges, or most of them, had been appointed by previous Presidents, most of them of the opposite party, and they tended to be hostile to any change in the law. For much of the same reason that led Congress to enact the Norris-LaGuardia Act removing the Federal courts' jurisdiction to issue injunctions in labor disputes, Congress wished also to protect the social measures of the 1930's from judicial pettifogging.

The courts, from the Supreme Court on down, were seen as a reactionary enemy to be restrained, rather than a coordinate instrument of Government. The agencies, by contrast, could be staffed with younger, friendlier men—James M. Landis, William O. Douglas—who, even while acquiring that mystic quality called "expertise," would not only accept, but advocate, the new social policies of the Nation.

As new judges were appointed and the national consensus for the new policies hardened, the courts themselves became willing partners in self-limitation, repeating with ever more force abstractions about expertise, the suitability of the administrative process to modern Government, and the reluctance of appointed judges to interfere with social policy. Never mind that no one had elected the administrators, either. In fact, to the extent that agency staff members were the real locus of power, no one had elected even the persons who chose them.

Now, in the late 1970's, it is wrong to accept uncritically concepts of the distribution of power called forth by the needs of 40 years ago. The Federal Government now is widely perceived to be too active, not too passive, and no part of the national establishment is by the popular mind more identified with this tendency than the "bureaucracy." To correct this trend of power, even to slow it, will be the work of not a few years. But a start can be made, and the so-called presumption of regularity, by which the citizen challenging his Government must always play with a deck legally stacked against him, is a good place to begin. One can easily see how the doctrine, along with its cousin sovereign immunity, took root in England, where the King—or the King in Parliament, at any rate—was sovereign, and citizens were called "subjects."

But why it should have flourished in America, where the people are sovereign and the agents of Government are servants, is a mystery. The proposition that the Government is presumed correct, that a tie, so to speak, always goes against the individual, is an alien tenet deserving of a quick death. Let the Government, with its vast resources and superior knowledge, bear the burden of proof. To be sure, the citizen should still have the burden of raising the issue

of a regulation's validity, by pleading or in some less formal way. He can still be given the burden of going forward with the evidence. But on the ultimate issue of whether an agency is lawfully within power delegated by Congress—itself only a creature of the people's Constitution, it is wrong to give the servant an automatic edge in the guise of a "presumption."

The same may be said of the rule that an agency's construction of its own statute should be deferred to. One can understand why the Supreme Court in the 1940's was anxious to defend the Labor Board's authority against unsympathetic courts of appeals, and some such motive may explain the language in Hearst. But on reflection the rule there announced is reduced to no more than this: That within some fairly broad range of choice, an agency decides the limits of its own powers, is judge in its own cause. In a lawsuit between A, a citizen, and B, an agent of Government, B wins because he says so. This is a monstrous rule, and no amount of usage or precedent should prevent the Congress from overturning it.

The proper disposition of power in our Government has been described in the following clear-eyed dissent by Mr. Justice Jackson, joined by Mr. Justice Frankfurter, no foe of administration as a modern technique of governing:

> I suggest that administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself, but the Court does not really face up to the fact that this is the justification it is offering for susaining the Commission's action. (*Securities & Exchange Commission* v. *Chenery*

It was, after all, Franklin D. Roosevelt himself who wrote:

> The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution. aSee Davis, *Administrative Law Treatise* section 1.04 at p. 28 (1958).)

It may be objected that this proposal will intrude the courts into policy areas where they have no business. Courts have made policy, of course, ever since the common law was conceived, but in a society increasingly governed by specific statutory pronouncements enacted by an elected legislature—to say nothing of a written Constitution, it must be conceded that the courts' law-making power is largely interstitial. As statutes become more numerous and more detailed each year, the function of the courts becomes, or should become, rather to enforce the policies of the Congress, than to create and enforce policies of their own. To hold that agency decisions in conflict with a policy of Congress should be overturned by the courts, however, is to aid the legislative process, not to hinder it, for legislation can never be specific enough to insure that in every instance the specific will of the legislators is carried out. A statute, once enacted, escapes the control of its writers, as it were, and becomes a living thing, with a life and growth of its own. Those chosen by the Congress to execute the statute may or may not do so faithfully. Political processes are not always sufficient to compel them to follow the spirit of the law. When they transgress it, a power of correction should reside somewhere and, under our system, that place is the courts.

Administrative agencies, after all, are no more law-making bodies than are courts. They are the creatures of Congress, possessing only those powers given them by legislation. It is not enough, for example, for an administrative official to argue that no law prohibits his action, and that therefore the courts should not intervene. As one court has properly observed: "this argument misses the point. The Secretary (of Transportation) is not so omnipotent that he must be presumed to possess the power to act as he chooses unless there is some law prohibiting him from so acting. He possesses only the power which Congress has given him, and the scope of that power is defined by Congress." *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department*, 446 F. 2d 1013, 1023, n. 18 (5th Cir. 1971).

Mr. President, I do not pretend to believe that the courts will ever wholly succeed in enforcing the will of Congress precisely as we would wish, in overruling those exercises of administrative power that truly go beyond the legislative mandate, and upholding those applications of statute that, while not perhaps to the judges' personal liking, are nevertheless within the range of choice left by Congress to the agency. The courts, that is, cannot do everything. I am convinced however, that they can do more than they have, if directed and encouraged by an amendment to the Administrative Procedure Act such as I am today proposing.

Judicial review, however imperfect, is at least a constant reminder to the administrative agencies that they are not all-powerful. Congress after all, paints with a broad brush. That is the nature of our legislative process. It is for the courts to see that the broad policies commanded by Congress are not distorted in individual situations by the agents of Congress. The courts cannot write the tune, but at least they can see that those who are playing it maintain the key chosen by its composer. As Archibald MacLeish has argued, the courts' labor is "the labor of order," *Apologia*. 85 *Harv. L. Rev.* 1505, 1508 (1972), to reduce the confusion, sometimes the chaos of the administrative process to order, so that that process will make sense for the individual citizen.

Mr. President, it is my hope that the bill I introduce today will be a step toward restoring order to the administrative process and, even more important, toward restoring our citizens' confidence in their own Government.

APPENDIX: ADDITIONAL RECENT CASES IN THE LOWER FEDERAL COURTS AFFIRMING THE RULE THAT AGENCY ACTION IS PRESUMED VALID

SECOND CIRCUIT

TNT Tariff Agents, Inc. v. *Interstate Commerce Comm'n*, 525 F. 2d 1088, 1093 (2d Cir. 1975): "At the outset, we note the presumption of validity accorded to administrative bodies acting within their sphere of expertise."

Board of Education v. *United States Department of Health, Education and Welfare*, 384 F. Supp. 816, 820 (S.D.N.Y. 1974): "Further, a plaintiff alleging improper government action is faced with the presumption that the administration's action is valid."

Chieppo Bus Co. v. *United States*, 383 F. Supp. 1192, 1197 (D. Conn. 1974): "Although we do not attach a presumption of correctness to the decisions of administrative agencies on questions of law, deference to the experience and expertise of such adjudicative bodies requires that the agency be given wide latitude in finding the facts and applying to them the appropriate legal standard."

FOURTH CIRCUIT

Campaign Clean Water, Inc. v. *Train*, 489 F. 2d 492, 501 (4th Cir. 1973): "After all, there is a presumption of legality that attaches ordinarily to an administrator's action and the burden of establishing impropriety rests on him who challenges."

FIFTH CIRCUIT

Gables by the Sea, Inc. v. *Lee*, 365 F. Supp. 826, 831 (S.D. Fla. 1973): "In order to upset the final agency decision, there must be a clear showing that such decision was improper. The burden of proving that the action was improper is on the party challenging the decision. It is well settled that there is a definite presumption of regularity in favor of the administrative decision."

Opelika Nursing Home, Inc. v. *Richardson*, 356 F. Supp. 1338, 1341–43 (M.D. Ala. 1973).

SIXTH CIRCUIT

Borg v. *Weinberger*, 381 F. Supp. 1212 (E.D. Mich. 1974): "There is a strong presumption that administrative exercise of discretion is proper, unless the action reflects such an abus of power as to be arbitrary and capricious."

Smith v. *City of Cookeville*, 381 F.Supp. 100, 109: "While, as always, the agency determination in this case is entitled to a presumption of regularity, . . . that presumption is not to shield . . . [the decision] from a thorough, probing, in-depth review.'"

EIGHTH CIRCUIT

First National Bank of Fayetteville v. *Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974): "To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case . . . 73 C.J.S. Public Admin. Bodies and Procedure § 209 at 569 (1951)."

NINTH CIRCUIT

Daly v. *Volpe*, 514 F.2d 1106, 1111 (9th Cir. 1975): ". . . the presumption of regularity that must be given to administrative decisions."

TEMPORARY EMERGENCY COURT OF APPEALS

Texaco, Inc. v. *Federal Energy Admin.*, 531 F.2d 1071, 1077 (T.E.C.A. 1976), *cert. denied*, –U.S.– (1976): "The burden is on the objectors to demonstrate the invalidity of the regulations."

Air Transport Ass'n of America v. *Federal Energy Office* 520 F.2d 1339, 1341 (T.E.C.A. 1975) (per curiam): "This court has repeatedly recognized the strong presumption [illegible] decisions by agen-

cies charged with the administration of a new federal statute."

American Nursing Home Ass'n v. *Cost of Living Council*, 497 F.2d 909, 914 (T.E.C.A. 1974): "In general the burden is on the challenger of agency regulations to demonstrate that they are arbitrary and capricious."

COURT OF CLAIMS

Boege v. *United States*, 206 Ct. Cl. 560, 569 (1975): "The simple answer to plaintiff's argument is that the agency delegated authority for promulgating and interpreting the JTRs (Joint Travel Regulations) is presumed to have carried out such responsibilities properly."

Mountain States Tel. & Tel. Co. v. *United States*, 499 F.2d 611, 615 (Ct. Cl. 1974): "Further, there is a presumption of the regularity of administrative action. This presumption is not rebutted by the mere fact that an agency's particular course of action is unique as compared to either the private sector or to the remainder of Government." ●

By Mr. DOLE:

S. 112. A bill to repeal the carryover basis provisions added by the Tax Reform Act of 1976; to the Committee on Finance.

REPEAL OF THE CARRYOVER BASIS PROVISIONS

Mr. DOLE. Mr. President, this year Congress must decide the fate of the onerous and ill-conceived carryover basis provisions adopted as part of the Tax Reform Act of 1976. The legislation which I am introducing today will repeal carryover basis and restore the law to its former status.

PRIOR LAW

Mr. President, under the law prior to the Tax Reform Act of 1976, the basis of inherited property was generally stepped up or down to its value on the date of the decedent's death. Under the carryover basis rules, the beneficiaries of an estate take the basis in the property that was the same as the basis in the property held by the decedent. The carryover basis provisions unfortunately vitiated many of the other estate tax reforms passed during the Tax Reform Act of 1976. The carryover basis rules have severely complicated estate tax calculations and has in many cases caused an economic hardship.

Mr. President, I might say that I am introducing the bill today, and I know of many Members of this body who have a great interest in this problem, but I do not know of any who has demonstrated his interest more, his concern more, than has the distinguished senior Senator from Virginia, Senator HARRY F. BYRD, JR., and I certainly appreciate his efforts in trying to come to some solution with the Treasury Department to work out the many problems created by the carryover basis amendments of the 1976 Tax Reform Act.

THREE-YEAR DEFERRAL

Mr. President, the Senate in passing the estate tax reforms in the 1976 Tax Reform Act did not adequately consider the changes made by carryover basis. When the Senate voted for final passage on the tax legislation in August 1976, there were only a few estate tax modifications in the bill. The Senate conferees accepted, as a substitute for its version, sweeping changes initiated by the House Ways and Means Committee. Hence, when the Senate voted on the conference report, it voted for broad, far-reaching changes never considerd either in the Finance Committee nor on the floor of the Senate. This lack of consideration is apparent.

The Revenue Act of 1978, postpones the effective date of carryover basis provisions so that they will only apply to property acquired from decedents dying after December 31, 1979. Congress must still decide whether carryover basis is the proper policy to pursue.

REPEAL CARRYOVER

The Senator from Kansas believes that carryover basis is an unmitigated complicated and unwarranted provision. There is no question that the current law is riddled with complexities that defy even the most sophisticated tax technician. However, even if the inordinate complexities could be eliminated, there still remains many difficulties with carryover basis. First of all, it is often difficult to prove basis. The record-keeping requirements and fiduciary responsibility cannot be overlooked. Established tax law is very clear—the burden is on the taxpayer to prove his basis. If the taxpayer cannot, then he obtains no basis in the asset.

TAX BURDEN

Carryover basis also increases the relative tax burden. The impact of carryover basis must be examined from the standpoint of both death taxes and income taxes generated by the sale of assets to pay the estate tax. The cumulative effect of Federal estate tax, State death taxes, and Federal and State income taxes imposed upon an estate often will consume much of the assets. The harsh tax result that flows from selling assets to raise the money to pay death taxes is unwarranted.

Mr. President, the enactment of carryover basis was a mistake. Congress should take the appropriate action to eliminate this error. I would urge the Senate Finance Committee to move expeditiously on my proposal so that no injustice can be inflicted by the carryover basis rules.

Mr. HARRY F. BYRD, JR. Mr. President, will the Senator from Kansas yield?

Mr. DOLE. I yield.

Mr. HARRY F. BYRD, JR. I thank the Senator from Kansas for his comments, and I am anxious to know what the legislation is that he is introducing on the carryover basis.

Tomorrow I shall address the New York State Bar Association on this question, among other matters, and I will let the New York State Bar Association know of the legislation being introduced today by the Senator from Kansas. I think that group will find great interest in that.

I thank the Senator from Kansas.

Mr. DOLE. I thank the Senator.

By Mr. THURMOND:

S. 113. A bill for the relief of Henry C. Fleming III; to the Committee on Armed Services.

HENRY C. FLEMING III

Mr. THURMOND. Mr. President, Mr. Henry C. Fleming III, of Greenwood, S.C., enlisted in the Marine Corps Reserve on February 3, 1976. He was assigned to initial active duty for training on June 30, 1976.

It was subsequently discovered that although his enlistment documents indicated his status as married with one dependent, his true marital status was married with one child but legally separated from his wife with a court order for support of the child.

Mr. President, an investigation was conducted by the Marine Corps regarding the circumstances of Mr. Fleming's enlistment. It was revealed that Mr. Fleming informed the recruiter of his marital status and was improperly advised by the recruiter not to indicate the existence of the child in order to save time and paperwork. Mr. Fleming agreed but later requested that the recruiter correct his enlistment documents. The correction was not accomplished.

All of the circumstances in Mr. Fleming's case were carefully reviewed at headquarters, Marine Corps, and it was determined that, since his enlistment involved recruiter misfeasance, Mr. Fleming had never legally terminated his status as a civilian; that his enlistment was void from its inception; that the Marine Corps lacked jurisdiction over him; and that it was necessary to release him from military control as expeditiously as possible. On October 22, 1976, Marine Corps Headquarters directed the Commanding General, Marine Corps Recruit Depot, Parris Island, S.C., to void Mr. Fleming's enlistment and release him from military control immediately. Mr. Fleming was released from military control on October 27, 1976, after performing his boot camp training in an outstanding manner.

Mr. President, in order to be discharged from an enlistment contract, a Marine must first have a valid contract. Since Mr. Fleming's enlistment was void from its inception, it was impossible to discharge him. The period of time which he spent with the Marine Corps was not considered active service and is not creditable as such.

It is current policy of the Department of Defense to suspend immediately payment of Government funds to an individual whose enlistment is believed to be void. If it is determined through investigation that the individual is serving a valid enlistment, payment of Government funds is authorized and the individual is entitled to all pay held in abeyance. If it is determined that the individual's enlistment is void, no further pay is authorized and all pay held in abeyance pending final determination in his case is retained by the Government.

Mr. Fleming's case has been reviewed by the Marine Corps Headquarters. It has been determined that Mr. Fleming was not properly enlisted; that his contract was void from the beginning in accordance with the ruling of the Court of Military Appeals in *U.S.* v. *Russo*, 23 USCMA 511, 50 CMR 651 (1975). As a consequence, his status as a civilian was never terminated. He was properly released from military control, and all pay withheld from Mr. Fleming was properly withheld in consonance with applicable policies, procedures, and laws governing void contracts.